KAMALAHASSAN LATCHIMANAN

v.

PP

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: A-05-59-03]
13 MARCH 2008

CRIMINAL PROCEDURE: *Trial - Dangerous Drugs Act 1952 - Trafficking - Role of informer - Whether informer metamorphosed into agent provocateur - Informer goes beyond mere supplying of information and encourages target to induce commission of a crime - Whether evidence admissible under s. 40A Dangerous Drugs Act 1952 - Benefit of doubt to be given to accused where there is uncertainty as to whether informer has metamorphosed into agent provocateur*

CRIMINAL PROCEDURE: *Trial - Prima facie case - Dangerous drugs - Trafficking - Discrepancies in evidence of - Whether prosecution established prima facie case as per charge - Presumption of trafficking not invoked by prosecution - Failure by prosecution to prove direct evidence to establish trafficking*

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Whether any serious errors in prosecution's case which warranted appellate interference - Many unsatisfactory features existing in prosecution's case - Unsafe to uphold conviction and sentence - Charge reduced to that of possession under s. 6 Dangerous Drugs Act 1952*

CRIMINAL PROCEDURE: *Sentence - Possession of drugs - Section 39A(2) Dangerous Drugs Act 1952 - 14 years imprisonment with effect from date of arrest and mandatory whipping of 10 strokes of rotan*

EVIDENCE: *Adverse inference - Presumption of adverse inference under s. 114(g) Evidence Act 1950 - Whether presumption to be raised - Whether failure to call informer who has metamorphosed into agent provocateur attracts presumption of adverse inference - Whether evidence adduced is so overwhelming as to suppress the effect of the invocation of s. 114(g) Evidence Act*

A Acting on information regarding the activity of an Indian Muslim trafficking cannabis at Jalan Kuala Kangsar, Ipoh, D/Sjn Busra b Abd Kadir (SP5) had arranged a meeting with an informer, to have himself introduced to the alleged trafficker *ie*, the appellant. SP5 was to be the potential buyer and thereafter to arrest the B appellant. The informer made an appointment with the appellant and on 1 February 2000, SP5 went to a restaurant with the informer where SP5 was introduced to the appellant. After negotiating the price, the appellant and SP5 went to a lane at the back of the restaurant where the appellant picked up a blue plastic C packet on the road beside a drain and handed it over to SP5. SP5 opened the packet, and found in it compressed dried leaves believed to be cannabis. At that point of time a police party lying in ambush arrested the appellant. Analysis confirmed that the seized blue packet contained a total of 316 grams of cannabis. D The High Court had held, *inter alia*: (a) that SP5's evidence was the main thrust of the prosecution's case, with the evidence establishing that the appellant was involved in a negotiation for the sale of drugs; (b) that SP5 was an agent provocateur and his evidence was admissible under s. 40A of the Dangerous Drugs Act E 1952 ("the Act"); (c) that the role played by the informer had not been exceeded, as to justify the invocation of s. 114(g) of the Evidence Act on the failure of the prosecution to call him as a witness. The appellant was convicted under s. 39B(1)(a) of the Act and he appealed.

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Held:

Per Suriyadi Halim Omar JCA delivering the judgment of the court

G **(1)** Where an informer goes beyond mere supplying of information or the mere introduction of the police to the appellant, but takes the extra mile of encouraging the target to induce the commission of a crime, courts are of the view that he has metamorphosed into an agent provocateur. If that happens his evidence becomes admissible under s. 40A of the Act but H naturally loses his protection under s. 40. (para 12)

(2) Once an informer falls under the category of an agent provocateur, any failure to call him as a witness may attract the presumption of adverse inference under s. 114(g) of the I Evidence Act 1950. (para 14)

(3) Having considered the totality of the evidence pertaining to the informer in this case, it was highly unlikely that this person was a mere informer. And if he was not a mere informer he thus must have crossed the line where the world of an agent provocateur begins. Even if there were uncertainty as to whether he was still a mere informer or not the benefit of the doubt must be given to the appellant. Further, the evidence adduced in this case was not so overwhelming as to suppress the effect of the invocation of s. 114 (g) of the Evidence Act. (para 20)

(4) The irresistible conclusion that the court could arrive at was that there probably never was a negotiation The prosecution never invoked the presumption of trafficking but had depended on direct evidence to establish trafficking *ie*, the alleged negotiation. However, the very existence of the negotiation had been rejected and thus there was total failure in establishing the essential ingredient. That being so the prosecution could not be said to have established a *prima facie* case as per the charge. (para 22)

(5) With so many unsatisfactory features existing in the prosecution's case the court was of the view that it was unsafe to uphold the eventual conviction and sentence by the High Court judge hence setting it aside. However, the court was satisfied that there was abundant evidence of the appellant being in possession of cannabis weighing 316 grams. With the other relevant ingredients of the charge having been established, the charge was reduced to that of possession under s. 6 of the Dangerous Drugs Act 1952, punishable under s. 39A (2) of the same Act. The appellant was sentenced to 14 years imprisonment, with effect from his date of arrest, and a mandatory whipping of 10 strokes of the rotan. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat mengenai kegiatan seorang India Muslim yang mengedar kanabis di Jalan Kuala Kangsar, Ipoh, D/Sjn Busra b Abd Kadir (SP5) telah merancang pertemuan dengan seorang pemberi maklumat bagi maksud memperkenalkan dirinya kepada pengedar tersebut, iaitu perayu di sini. SP5 akan berlakon sebagai seorang bakal pembeli dan kemudian akan menangkap perayu. Pemberi maklumat telah membuat temujanji dengan perayu dan

pada 1 Februari 2000, SP5 bersama dengan pemberi maklumat telah pergi ke sebuah restoran di mana SP5 diperkenalkan kepada perayu. Selepas berunding mengenai harga, perayu dan SP5 pergi ke lorong belakang restoran tersebut dan di situ perayu mengambil satu paket plastik biru dari atas jalan di tepi longkang dan menyerahkannya kepada SP5. SP5 membuka paket dan mendapatinya mengandungi daun-daun kering mampat dipercayai kanabis. Pada waktu itu, pasukan polis yang sedang mengendap telah menangkap perayu. Analisa mengesahkan bahawa paket plastik biru yang dirampas mengandungi sejumlah 316 gram kanabis. Mahkamah Tinggi memutuskan antara lain: (a) bahawa teras utama kes pendakwaan adalah bersandar kepada keterangan SP5 di mana keterangan itu menunjukkan bahawa perayu terlibat dalam perundingan untuk menjual dadah; (b) bahawa SP5 adalah seorang ejen provokatur dan keterangannya boleh diterima-masuk di bawah s. 40A Akta Dadah Berbahaya 1952 ("Akta"); dan (c) bahawa peranan yang dimainkan oleh pemberi maklumat tidak melampaui batas bagi mewajarkan pemakaian s. 114(g) Akta Keterangan berkaitan kegagalan pendakwaan memanggilnya sebagai saksi. Perayu dengan itu disabitkan di bawah s. 39B (1)(a) Akta dan beliau telah merayu.

Diputuskan:

Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah

(1) Apabila seorang pemberi maklumat bertindak lebih jauh dari memberikan maklumat atau dari hanya memperkenalkan pegawai polis kepada perayu, dengan cara mengambil langkah tertentu untuk mendorongnya melakukan kesalahan, mahkamah berpandangan bahawa beliau telah bertukar menjadi seorang ejen provokatur. Jika itu berlaku, keterangannya menjadi boleh diterima-masuk di bawah s. 40A Akta tetapi beliau kehilangan perlindungan di bawah s. 40.

(2) Sebaik seorang pemberi maklumat terangkum di bawah kategori ejen provokatur, kegagalan untuk memanggilnya sebagai seorang saksi boleh menarik anggapan inferens memudaratkan di bawah s. 114(g) Akta Keterangan 1950.

(3) Mengambilkira keseluruhan keterangan berkaitan pemberi maklumat dalam kes ini, adalah amat tidak mungkin bahawa beliau hanya seorang pemberi maklumat semata-mata. Ertinya, beliau telah melangkah dan melepasi garisan yang memisahkannya dengan seorang ejen provokatur. Jikapun terdapat keraguan

sama ada beliau masih seorang pemberi maklumat, manfaat keraguan itu harus diberikan kepada perayu. Selain itu, keterangan yang diberikan di dalam kes ini tidak sebegitu kukuh dan meliputi sehingga boleh menolak penggunaan s. 114(g) Akta Keterangan.

(4) Konklusi tidak dapat tidak yang boleh diambil oleh mahkamah adalah bahawa rundingan berkemungkinan langsung tidak wujud. Pendakwaan tidak menggunapakai anggapan pengedaran tetapi bergantung kepada keterangan terus bagi membuktikan pengedaran, iaitu perundingan yang didakwakan itu. Bagaimanapun, kewujudan perundingan seperti itu telah tertolak dan akibatnya terdapat kegagalan total untuk membuktikan ingredien penting tersebut. Dalam keadaan sedemikian, pendakwaan tidak boleh dikatakan sebagai telah membuktikan kes *prima facie* terhadap pertuduhan.

(5) Dengan kes pendakwaan dicacati kepincangan kepincangan ini, maka mahkamah berpendapat bahawa adalah tidak selamat untuk mengesahkan sabitan serta hukuman yang dijatuhkan oleh hakim Mahkamah Tinggi. Keputusan tersebut dengan itu adalah diketepikan. Walau bagaimanapun, mahkamah berpuashati bahawa terdapat keterangan yang melambak mengenai perayu mempunyai milikan kanabis seberat 316 gram. Dengan ingredien-ingredien lain pertuduhan telahpun dibuktikan, pertuduhan dipinda kepada pertuduhan di bawah s. 6 Akta yang boleh dihukum di bawah s. 39A(2) Akta. Perayu dihukum 14 tahun penjara dari tarikh beliau ditangkap dan 10 sebatan rotan.

Case(s) referred to:
Adel Mohammad el Dabbah v. AG Palestine [1944] AC 156 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Namasiyian & Ors v. PP [1987] 2 MLJ 336 ***(refd)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 6(1), 37, 39A(2), 39B(1)(a), 40A(1)
Evidence Act 1950, s. 114(g)

For the appellant - Dato Kumaraendran; M/s Kumar & Co
For the respondent - Eddie Yeo Soon Chye; DPP

[Appeal from High Court, Ipoh; Criminal Trial No: 45-16-2001]

Reported by Amutha Suppayah

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JUDGMENT

Suriyadi Halim Omar JCA:

[1] On 11 March 2008 we heard this appeal, and had set aside the conviction of the appellant under s. 39B(1)(a) of the Dangerous Drugs Act 1952, which carries the mandatory sentence of death by hanging. We had instead substituted that conviction with that of s. 6(1) of the Dangerous Drugs Act 1952, for being in possession of 316 grams of cannabis, and sentenced him under s. 39A(2) of the same Act.

[2] As regards the facts, acting on information regarding the activity of an Indian Muslim trafficking cannabis at Jalan Kuala Kangsar, Ipoh, D/Sjn Busra b Abd Kadir (SP5) had arranged a meeting with an informer, to have himself introduced to the alleged trafficker ie, the appellant. SP5 was to be the potential buyer and thereafter to arrest the appellant. The informer made an appointment with the appellant whereby he agreed to meet SP5 on 1 February 2000 between 2pm to 2.30pm at Restoran Rajamah, Jalan Kuala Kangsar, Ipoh. At about 2.20pm on 1 February 2000, SP5 went to Restoran Rajamah with the informer. Upon reaching the vicinity the informer went alone into the said restaurant while SP5 waited outside.

[3] At about 3.10pm the informer called SP5 on his hand phone informing him that the appellant had arrived and was with him in the restaurant. SP5 went into the restaurant where he was introduced to the appellant. The latter introduced himself as Kamal. He informed SP5 that he only had about 1/2 kg of drugs ('barang'). Some discussion was held between them about the price of the drugs. When they reached an agreement on the price, the appellant together with SP5 went to a lane at the back of the restaurant, and upon reaching the end of the lane the appellant picked up a blue plastic packet on the road beside a drain and handed it over to SP5. SP5 opened the packet, and found in it compressed dried leaves believed to be cannabis, wrapped in a Malay newspaper.

[4] SP5 handed back the packet to the appellant and pretended to take out a sum of money totalling RM2,000 (normally referred to as flash money) from his pocket to pay him. SP5 then immediately gave the prearranged signal to the police party lying in ambush followed by his arrest of the appellant. The seized

plastic packet was taken by C/Insp Elias b. Abu Bakar (SP4). At the Narcotics office, SP4 marked the exhibits, left his signature and subsequently handed it over to the investigating officer (SP7), together with the appellant at about 7pm. At about 11.05am on 2 February 2000, SP7 handed over the exhibits to the Chemistry Department in Ipoh for analysis. The analysis was done by SP2 who then confirmed that the seized blue packet contained a total of 316 grams of cannabis.

Findings Of The High Court Judge

[5] The High Court had concluded that the evidence of SP5 was the main thrust of the prosecution's case, with the evidence establishing that the appellant was involved in a negotiation for the sale of drugs. The informer only played the role of setting up a meeting between SP5 and the appellant. The evidence of SP5 was corroborated by the evidence of SP4 who testified that he was informed by SP5 about the information received. It was on his instruction that P5 had acted as an agent provocateur to meet the appellant. It was not disputed that SP5 was an agent provocateur and his evidence was admissible under s. 40A of the Dangerous Drugs Act 1952. The evidence of SP5 was never really challenged by the defence; instead it was the existence of the informer and his identity that attracted much of the defence attention. From the entirety of the evidence, the court had held that the role played by the informer had not been exceeded, as to justify the invocation of s. 114(g) of the Evidence Act on the failure of the prosecution to call him as a witness. His role was merely to introduce the appellant to SP5. At no time was he proved to be playing any important role that could turn him into an agent provocateur or a *participes criminis*.

[6] The court was satisfied too with the evidence of SP6 (the Government Chemist, which showed that the analysis carried out on the exhibit was by way of four tests involving physical examination as well as microscopic examination on the whole of the compressed plant material. A total of 32 random samples were taken in order to carry out further tests namely DLT and TLC. The total weight of the 32 random samples taken for the two chemical tests was 114 grams (which amounted to 36.08% of the total weight). The requirement of s. 37(j) of the Dangerous Drugs Act had been fulfilled. The gross weight of the drugs seized was

360 grams whilst the net weight was only 316 grams. The reason for the discrepancy was simply brought about by the packaging material namely the plastic packet and the newspaper wrapping which was included in the investigating officer's weighing. From the evidence of SP4, SP7 (the investigating officer), SP2 (store keeper) and SP3, there was no break in the chain of evidence as regards the exhibits. From the above the court was satisfied that the prosecution had established a prima facie case and thereupon had called the defence.

[7] The appellant's defence was as follows. On 1 February 2000 at about 2pm while he was alone in his adopted mother's house, his friends Basirudin and Yusof came to visit him. They came in a car (Proton Iswara) registered as BCU 1362. At about 3pm they left the house for Chemor to eat and Basirudin drove the car with Yusof seated in front. When passing through Jalan Kuala Kangsar near Restoran Rajamah, Basirudin suddenly turned left, passed in front of Restoran Rajamah, and stopped at the end of a lane. Basirudin then took out a blue plastic packet from the car dashboard and placed it at a rubbish dump nearby. Basirudin then got back into the car and made a u-turn to go out. Halfway through he stopped the car, and told the appellant to go to Restoran Rajamah to meet his friend named Man, and to tell Man that he had placed the blue plastic packet at the rubbish dump. The appellant went to the restaurant, met Man, and was introduced there to a Malay man named Bob. After telling Man that Basirudin had placed the blue plastic packet at the rubbish dump and was about to leave, Man asked the appellant to show where the packet was placed to Bob. This part of the evidence of the appellant was rejected by the court. According to the court it was highly improbable for the appellant not to bother to even ask why Basirudin acted the way he did, and for him to be so willing and obliging to do what was instructed by Basirudin. It was made more improbable when he acceded to Man's request to show Bob (SP5) the place where the blue plastic packet was allegedly placed by Basirudin. Pertaining to the defence, that the appellant was never in possession of the drug, and had no knowledge about it was rejected. The court had concluded that the prosecution was not relying on any presumption under s. 37 of the Dangerous Drugs Act 1952, and there was evidence that the appellant was caught transacting the sale of cannabis.

[8] Having perused the learned High Court judge's judgment, we could not disagree with him that the prosecution had established the type of drugs involved ie, cannabis, and its weight as particularized in the charge. We were satisfied too that the chain of evidence as regards the drugs had not been compromised. Even the issue of burden of proof required by the appellant to rebut the prosecution's case, which initially in the Memorandum of Appeal had been one of the grounds of appeal, and not canvassed eventually, had been correctly dealt with by the learned judge. It was correct that the burden to rebut the prosecution's case was on a balance of probability as statutorily required under s. 182A of the Criminal Procedure Code.

[9] So, why did we set aside the conviction and substitute it with the amended charge? Despite the well researched judgment we detected certain serious errors at the prosecution's stage which warranted our interference. There was the issue of the informer ie, whether he had metamorphosed to that of an agent provocateur and the repercussion of not calling him as a witness or offered to the appellant, whether negotiation had conclusively been proved between the appellant and SP5 in light of PW8's evidence, and whether only mere possession had been established.

[10] It was a fact that an informer was instrumental here in the events that led to the eventual arrest of the appellant. The law is quite clear that under s. 40 of the Dangerous Drugs Act an informer is protected statutorily from discovery. This section reads:

> (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
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> (2) If any books, documents or papers which are in evidence or contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
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> (3) If on trial for any offence under this Act the Court, after full inquiry into the case, 'is of opinion that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other

A proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

B **[11]** This provision has been invoked and discussed in quite a few cases though the emphasis has been more on the matter of the definition of the word 'informer'. This was inevitable as that term was not defined in the Act; though in ordinary parlance an informer is a person who provides information (*Law of Dangerous*
C *Drugs (Cases and Commentaries)* by Daljit Sen Adel). In relation to criminal cases, an informer may be defined as an undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime *(Black's Law Dictionary)*. The above s. 40 succinctly
D promulgates that no witness shall be permitted to disclose the name and address of any informer or state any matter which discloses his identity. In other words to fall under the definition of 'informer' his identity must remain undisclosed. But courts have given it an extended meaning, and have accorded all the privilege
E of s. 40 for informers, even though their identities have been disclosed (more of this later).

[12] Currently, in a police operation where an informer goes beyond mere supplying of information or the mere introduction of
F the police to the appellant, but takes the extra mile of encouraging the target to induce the commission of a crime, courts are of the view that he has metamorphosed into an agent provocateur. If that happens his evidence becomes admissible under s. 40A of the same Act but naturally loses his protection under the
G abovementioned s. 40.

[13] Normally an agent provocateur is presumed to be unworthy of credit and testimony. Section 40A(1) supplies the exception in that no agent provocateur shall be presumed to be unworthy of
H credit by reason only of his having attempted to abet or had abetted the commission of an offence by any person under the Dangerous Drugs Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

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[14] Once an informer falls under the category of an agent provocateur, any failure to call him as a witness may attract the presumption of adverse inference under s. 114(g) of the Evidence Act 1950. In such a situation since it is the right of the prosecution to call or not to call any witness, and to avoid any potential sticky position, rather than calling him to testify, it is in order for the prosecution to offer that witness to the accused person (*Adel Mohammad el Dabbah v. AG Palestine* [1944] AC 156). By doing this the prosecution avoids being accused of suppressing or withholding any evidence in the form of a witness (*Munusamy v. PP* [1987] 1 MLJ 492/494).

[15] Where then is the line to be drawn as to when an informer becomes an agent provocateur? In *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, Mohammad Azmi SCJ was generous when he opined that a police informer was not an agent provocateur merely because he had accompanied a police agent and introduced him to a drug trafficker. Somehow the statutory ingredient of the need to be undiscovered to qualify as an informer had been missed. The Supreme Court had further opined:

> **In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case**. In the instant case the protection under section 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under section 114(g) (emphasis added).

[16] In *Namasiyian & Ors v. Public Prosecutor* [1987] 2 MLJ 336 it was held that a person who not only introduced the accused but was present on more than one occasion including at the time of the accused's arrest in the subsequent delivery of the drug, was a *particepes criminis* and not an informer whose failure to appear in court may well attract the provisions of s. 114(g) of the Evidence Act 1950. In brief, apart from being an introducer and hence identifiable, and was present on more than one occasion in the presence of the trafficker including when he was arrested, he had become an agent provocateur. In *Pendakwa Raya v. Mansor bin Mohd Rashid & Anor* [1997] 1 CLJ 233 the apex court held a slightly modified view. The antecedents of the case showed that the role played by an informer, one Cholar had come under heavy

A scrutiny of the High Court judge, during the trial. At the conclusion of the case the learned trial judge had held that the role played by Cholar was more than that of an informer and had disentitled him to the statutory protection under s. 40(1) of the Act. Based on the evidence that Cholar introduced PW9 to the
B second respondent on 18 July 1991, accompanied and witnessed PW9 purchasing one kati of ganja from the first accused on 22 July 1991 in the house No 129; and again accompanied and was present throughout the discussion between the first respondent and PW9 regarding the purchase of the cannabis(subject
C matter of this offence) on 31 July 1991 in the said house, the learned trial judge said 'the informer participated in the trap set up by Badaruddin which eventually led to the arrest of the three accused persons and the seizure of the drugs.' Thus the learned trial judge said that Cholar was not just an informer but an active
D agent provocateur, and that failure by the prosecution to call or offer Cholar to the defence would give rise to adverse inference under s. 114(g) of the Evidence Act 1950.

[17] The Federal Court on the other hand, despite the active
E involvement of the exposed informer disagreed with the High Court and had held that based on the particular facts and circumstances of the case Cholar was not an agent provocateur. Interestingly enough the Federal Court after arriving at that finding remarked that, even if Cholar were an agent provocateur and
F hence should have been called, there was more than sufficient credible evidence of the respondents' involvement in drugs trafficking to convict him. It would appear that the Federal Court justified its disagreement with the High Court's stance due to the availability of overwhelming evidence of the accused person's
G culpability. It could be read that since the conviction of the accused person would still be assured, despite the invocation of s. 114(g) of the Evidence Act, the informer's status as an agent provocateur did not really matter.

H **[18]** If the degree of participation is the dividing line, surely the following pieces of evidence will highlight the active role played by the informer in this case:

i. even though the informer was not in the briefing he was present in the police station while the briefing was going on;

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ii. he was around for some time and must have heard the alleged negotiation between SP5 and the appellant; and

iii. he was nearby when the appellant was arrested (see *Namasiyam* on this issue).

[19] Even though SP5 had testified that the informer had kept quiet during the negotiation, he admitted in court that the informer was an important witness, and had an interest in the case. If the informer was a mere informer why was there a necessity to be present at the police station? Why did he not leave immediately after the introductions were over? Why must he be present when the arrest took place? Factually he was present in every significant event. If SP5 had telephoned the appellant before the meeting at Rajamah why was there the need to have the informer in the vicinity of the ambush? With the informer's cover and identity blown, there was no justification in not calling him as a witness, or for that matter not offering him to the appellant.

[20] Having considered the totality of the evidence pertaining to the informer it was highly unlikely that this person was a mere informer. And if he was not a mere informer he thus must have crossed the line where the world of an agent provocateur begins. Even if there were uncertainty as to whether he was still a mere informer or not the benefit of the doubt must be given to the appellant. We had to bear in mind too that the evidence adduced in this case was not as overwhelming as in the above case of *Pendakwa Raya v. Mansor bin Mohd Rashid & Anor*, which would suppress the effect of the invocation of s. 114(g) of the Evidence Act.

[21] The other relevant question that disturbed our minds when deliberating the appeal was the issue of the negotiation. According to SP5, the negotiation with the appellant took up 15 minutes, yet SP8 who was a prosecution's witness had testified that SP5 and the appellant only conferred for 3-4 minutes. For someone who had never met the appellant, and yet succeeded in establishing all the terms of the transaction, surely 3-4 minutes was too quick. Yet 3-4 minutes would tally with the evidence of the appellant's story that he was there only to inform the informer of the plastic blue bag. In a gist the issue of negotiation was subverted by the prosecution's very own evidence of PW8.

[22] Additional to this doubt was the allegation by SP5 that he flashed RM2,000 to establish the authenticity of his desire to buy drugs. Yet SP7, the investigating officer had no knowledge of this money. No explanation was given by SP4 and SP5 why the investigating officer was not informed of this highly important piece of evidence, for trap cases of this nature. In any entrapment case set up by the Anti-Corruption Agency, not too dissimilar to cases of this nature, the availability of the marked notes in the safe keeping of the investigating officer would certainly not be taken lightly. The irresistible conclusion that we could arrive at, out of this gap in the chain of evidence, was that there probably never was a negotiation. The additional evidence of SP8 rebutting SP5's evidence in relation to the time factor required for the negotiation made short shrift of that alleged incident. Since the prosecution never invoked the presumption of trafficking in its case, but had confidently depended on direct evidence to establish trafficking ie, the alleged negotiation, but its very existence now having been rejected, there thus was total failure in establishing such an essential ingredient. That being so the prosecution could not be said to have established a *prima facie* case as per the charge.

[23] With so many unsatisfactory features existing in the prosecution's case we were of the view that it was unsafe to uphold the eventual conviction and sentence by the High Court judge hence its setting aside. Despite that setting aside order, we were satisfied that there was abundant evidence of the appellant being in possession of cannabis weighing 316 grams. With the other relevant ingredients of the charge having been established, we had no hesitation in reducing the charge to that of possession under s. 6 of the Dangerous Drugs Act 1952, punishable under s. 39A (2) of the same Act. After hearing the mitigation of learned counsel for the appellant and views of the learned Deputy Public Prosecutor, we had sentenced the appellant to 14 years imprisonment, with effect from his date of arrest, and a mandatory whipping of ten strokes of the rotan.